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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Marriage of JAMES D.  
and ZANA WHOOLEY.

B277145

JAMES D. WHOOLEY,

Los Angeles County  
Super. Ct. No. BD602832

Respondent,

v.

ZANA WHOOLEY,

Appellant.

APPEAL from a judgment and order of the Superior Court  
of Los Angeles County, Robert B. Broadbelt III, Judge. Affirmed.

Weintraub Tobin and Brendan J. Begley for Appellant.

James D. Whooley, in pro. per., for Respondent.

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Zana Whooley appeals from the trial court's denial of her requests for attorney fees in the dissolution of her marriage to James D. Whooley. The trial court did not abuse its discretion, and we affirm.

Zana and James<sup>1</sup> married on May 20, 2004, and have two children, Joseph (born in 2006) and Liam (born in 2009). James filed a petition for dissolution on June 3, 2014. James is a senior litigation associate at a large law firm; he does not practice family law. He represented himself beginning in April 2015 after incurring over \$40,000 in attorney fees. Zana does not work outside the home and has not worked full time since the marriage, although she did some work as an actress. She has a degree from an Italian university and attended three semesters of an LLM degree program, but has been unable to pass the California bar exam. Zana was represented by various counsel before and during the five-day trial in October and November 2015. The trial court issued its tentative decision and proposed statement of decision in March 2016. Beginning in April 2016, Zana represented herself most of the time. James represents himself on appeal, and Zana is represented by counsel.

The trial court entered judgment on June 14, 2016, incorporating a thirty-two page statement of decision. The judgment resolved disputed issues, finding the date of separation was August 12, 2014, and awarding joint legal and physical custody of Joseph and Liam to Zana, with substantial visitation for James. The court declined to impute income to Zana, finding

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<sup>1</sup> We refer to the parties by their first names to avoid confusion.

she had no opportunity to earn income because Liam had been diagnosed with autism disorder, and he required substantial behavioral treatment and therapy in which Zana participated and which she coordinated. The court ordered James to pay Zana \$3,811 per month in child support, and \$4,200 per month in spousal support.

A partial settlement agreement awarded property and bank accounts to the parties. After trial, James agreed to move out of a condominium that was his separate property (the Rockland property) and transfer it to Zana for \$475,000, so she and the children could move out of the home she rented and remain in the children's school district, and to resolve Zana's objection to the sale of a rental property (the Coronado property). As to disputed items, the court found that an IRA account was community property, and James had no goodwill in his law practice because he was not an equity or contract partner (among other reasons). The court declined to order James reimbursed for the down payment on the Coronado property and other claims, and granted Zana's request for reimbursement of half of uninsured health care expenses for the children, and half of the funds James transferred from their joint checking account into another in his own name. The court awarded a Los Angeles investment property to James, and ordered that the Coronado property be sold and the proceeds divided equally after all encumbrances were paid. After division of the remaining community assets, the court ordered James to pay Zana an equalization payment of \$171,225, subject to adjustments related to the transfer of the Rockland property and the sale of the Coronado property.

In her October 2015 trial brief, Zana requested an award of attorney fees under Family Code sections 271 and 2030.<sup>2</sup> Zana argued James’s self-representation drove up her legal fees, he would end up with substantially greater assets, and he had been “unremittingly litigious” and unwilling to settle. In response, James stated that he had paid his monthly support obligations (more than half his post-tax income) since the date of separation in August 2014, and had attempted settlement with no response. He had reluctantly ended his relationship with counsel in April, which “has been extremely difficult personally and likely detrimental to my interests in this case, but financially I had no other choice.”

The court declined to award fees under section 271, finding James’s conduct did not frustrate the policy of the law to promote settlement or encourage cooperation between the parties and attorneys.

Turning to section 2030, the court concluded that James would be paying Zana child and spousal support of more than half of his monthly net disposable income and 24% of his bonus income. After the property division, Zana and James had roughly equal assets, and Zana would have sufficient liquid assets to pay her attorney fees after the sale of the Coronado property. “Based on the court’s consideration of all these factors, the court finds that an award of attorney’s fees and costs under Family Code § 2030 is not appropriate, there is not a disparity between the parties in access to funds to retain or maintain counsel, and one party (Petitioner) is not able to pay for legal representation of

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<sup>2</sup> All subsequent statutory references are to the Family Code.

both parties.” The court denied Zana’s request for fees under section 2030.

At a hearing on June 30, 2016, the trial court considered Zana’s May 23, 2016 request for an order modifying the award of child support, attorney fees, and other relief, including a “need-based” request for an additional \$30,000 in future appellate fees and costs for Zana to retain another attorney, and other post-judgment fees. Zana was represented by a prior counsel. James argued the court had already determined the relative financial situations of the parties, and Zana had not identified how her situation had changed to her detriment. The court disregarded Zana’s late supplemental request for fees filed just six days before the hearing, in which she requested \$230,080.90 in fees (including amounts not previously requested).

The trial court concluded that Zana had not filed a valid income and expense declaration with her May 23, 2016 appellate fee request. Zana had not met her burden to prove her current assets (including recently transferred real property). The court denied Zana’s request for appellate fees.

Zana filed a notice of appeal from the judgment, and a second notice of appeal from the denial of her request for appellate attorney fees at the June 30, 2016 hearing. She does not challenge the judgment except as it denies her request for attorney fees.

## **DISCUSSION**

Zana sought attorney fees under sections 2030 and 271.

### **1. *Section 2030***

Section 2030, subdivision (a)(1) states:

“[T]he court shall ensure that each party has access to legal representation . . . to preserve

each party's rights by ordering, if necessary based on the income and needs assessments, one party . . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding."

When a party requests attorney fees and costs under section 2030,

"the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs."

(§ 2030, subd. (a)(2).)

Section 2032, subdivision (a) provides additional guidance, stating the court should consider whether "the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." The fact that the party requesting fees could pay its own fees does not necessarily bar a fee award: "Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances." (*Id.*, subd. (b).) As the party requesting fees, Zana had the burden to establish the need for an

award. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 824.) A fee request under section 2030 is left to the sound discretion of the trial court, and we overturn the trial court's ruling on a fee motion " 'only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made.' " (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769.)

The court did not (as Zana claims) "overlook" the parties' relative circumstances, and instead carefully took those circumstances into account. In addressing Zana's fee request, the trial court's statement of decision considered the parties' income and need assessments, their stipulated income and expense declarations, and declarations and exhibits submitted regarding the fee request. As we described above, the court took into account that Zana would receive more than half of James's income in child and spousal support and one-fourth of his bonus income. The court considered the parties' reasonable living expenses and the division of property, and concluded: "[T]here is not a disparity between the parties in access to funds to retain or maintain counsel, and one party ([James]) is not able to pay for legal representation of both parties." We will not second-guess the court's assessment of the parties' financial situations, despite Zana's claim in her fee request that James would end up with substantially greater assets than Zana. (Instead, the court determined that their assets were roughly equal.) "The trial court was in a far better position than this court to assess the factual basis for appellant's assertions, and apparently found it lacking." (*In re Marriage of Huntington* (1992) 10 Cal.App.4th 1513, 1525.) Although Zana argues the trial court miscounted her assets, she does not cite to objections in the record. Viewing

the evidence in the light most favorable to the trial court's order, we do not second-guess the court's calculations.

We disagree that the record shows the trial court "pressur[ed] Zana to submit to litigating the issue on declarations instead of by live testimony." In the portion of the transcript Zana cites, the court ruled that Zana could present evidence in support of attorney fees "by way of testimony and exhibits." We similarly see no abuse of discretion in the trial court's regulation of discovery.

The trial court also could consider the parties' trial tactics in evaluating Zana's fee request under section 2030. (*In re Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 657.) As we explain below in our discussion of section 271, the trial court did not abuse its discretion when it concluded that James did not frustrate the policy promoting settlement and encouraging cooperation between parties and attorneys.

Zana cites *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, which reversed two orders made in advance of a child custody hearing brought by an ex-wife. The trial court awarded the ex-wife \$9,000 in attorney fees in the first order, and in the second made a mistake of law in reducing the ex-husband's cost award resulting from a previous appeal. (*Id.* at pp. 241-243.) The court of appeal concluded that the ex-husband, who represented himself throughout, filed the writ petitions to "scrape up sufficient money to retain counsel" for the upcoming child support proceeding, and the error on the cost bill deprived him of money he could use for a retainer. (*Id.* at pp. 242-243.) In contrast, Zana was represented by various counsel throughout the trial and does not argue she was not well-served by their efforts. James represented himself at trial, and while he is an



attorney, he does not practice family law. The denials of Zana's fee requests did not produce an imbalance that left one party "to haplessly flail away" while the other had "able and diligent counsel," so as to frustrate section 2030's "purpose [of] *parity*: a fair hearing with two sides equally represented." (*Alan S.*, at pp. 242, 251.) In addition, the record shows that the trial court in this case considered "the 'big picture' " and all relevant circumstances, which, by contrast, the trial court in *Alan S.* did not. (*Id.* at pp. 254-255.)

Zana argues that in denying her request for appellate fees the trial court made a "one-sided" ruling when it focused on her failure to submit a completed income and expense declaration. As the court noted, however, Zana failed to include an estimate of the value of any real or personal property, even though James had recently transferred the Rockland property to Zana.

Zana has not shown that no reasonable judge could have denied her attorney fees requests.

## **2. Section 271**

Section 271, subdivision (a) allows the trial court to impose fees and costs "in the nature of a sanction" based "on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." The party requesting an award under section 271 "is not required to demonstrate any financial need for the award." (*Ibid.*) "The purpose of section 271 is 'to promote settlement and to encourage cooperation which will reduce the cost of litigation.' [Citation.] [Citations.] 'Family law litigants who flout that policy by engaging in conduct that increases litigation costs are

subject to the imposition of attorneys' fees and costs as a sanction. [Citations.]’ ” (*Parker v. Harbert* (2012) 212 Cal.App.4th 1172, 1176.)

We review the court's denial of Zana's section 271 fee request for an abuse of discretion. (*In re Marriage of Fong* (2011) 193 Cal.App.4th 278, 291; *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1316.) We will overturn the trial court's order “ ‘only if, considering all of the evidence viewed most favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order.’ ” (*Fong*, at p. 291.) We review the trial court's factual findings in connection with the order for substantial evidence. (*Ibid.*)

Zana argues that James escalated the litigation by disputing the source of the down payment for the Coronado property, disputing the date of separation, and filing an ex parte motion to require the submission of applications to allow the two boys to remain in the school district. James points out that he attempted to produce evidence that the down payment came from his separate property, but the trial court did not allow his supporting exhibit into evidence; that Zana at first agreed with him about the date of separation; and that he never filed the ex parte application regarding the school district, but only sought to do so in case Zana lost her rental home and the children were uprooted to a new district (before the agreement to sell the Rockland property to Zana). He argues that Zana, for her part, pursued a meritless claim that James possessed “goodwill” as a big-firm associate, which was central to the failure to settle before trial, and made other unreasonable demands that made settlement impossible.

We have reviewed the trial record, and, considering “the conduct of *each* party or attorney” as section 271, subdivision (a) directs, we conclude both James and Zana pursued claims that consumed court time and ultimately proved unsuccessful. That is the nature of trial. Considering the evidence in the light most favorable to the trial court’s order, the record does not show that James’s conduct was so obstructive, or so inimical to settlement, that no reasonable judge could have found James’s conduct did not frustrate the policy promoting settlement. The trial court did not abuse its discretion when it denied Zana’s motion for fees under section 271.

#### **DISPOSITION**

The judgment and order are affirmed. Each party shall bear his or her own costs.

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EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.